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Supreme Court of the United States

OCTOBER TERM, 1970

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SUPREME COURT, U.S.

No. 1024

GEYER BROADCASTING CO., INC.,

Petitioner,

v.

HON. CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Evansville Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November, 1970

WILLIAMS PRINTING COMPANY, INC., CHICAGO, ILLINOIS

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and federal rules involved	2
Statement	3
Reasons for granting the writ	4
Conclusion	13
Appendices	14

CITATIONS

Cases:

Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959)	2, 8
Bloom v. *Illinois*, 391 U.S. 194 (1967)	7
Dairy Queen v. *Wood*, 369 U.S. 469 (1962)	2, 8, 9
DePinto v. *Provident Security Life Insurance Co.*, 323 F.2d 826 (9th Cir. 1963)	10
Dimick v. *Schiedt*, 293 U.S. 474 (1934)	7
Duncan v. *Louisiana*, 391 U.S. 145 (1967)	7
Duplex Co. v. *Deering*, 254 U.S. 443 (1921)	6
Fleitmann v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916)	13
Halladay v. *Verschoor*, 381 F.2d 100 (8th Cir. 1967)	11
LeCassagne v. *Chapuis*, 144 U.S. 119 (1892)	6
Leimer v. *Wood*, 196 F.2d 828 (8th Cir. 1952)	13
Lewis v. *Times Publishing Co.*, 185 F.2d 857 (5th Cir. 1950)	5
Mecker v. *Ambassador Oil Corp.*, 375 U.S. 160 (1963)	9

PAGE

Olearchick v. *American Steel Foundries*, 73 F.Supp. 273 (W.D. Pa. 1947) 5

Ross v. *Berghard*, 396 U.S. 531 (1970) 9, 10

Simler v. *Conner*, 372 U.S. 221 (1963) 9

Standard Oil Co. v. *United States*, 283 U.S. 163 (1931) . 6

Steffen v. *Farmers Elevator Service Co.*, 109 F.Supp. 16 (N.D. Iowa 1952) 13

Sullivan v. *Wirtz*, 359 F.2d 426 (5th Cir. 1966) 4, 12

Swift & Co. v. *United States*, 276 U.S. 311 (1928) 6

Thermo-Stitch, Inc. v. *Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961) 10

United States v. *Oregon Medical Society*, 343 U.S. 326 (1952) 6, 7

White v. *Sparkill Realty Co.*, 280 U.S. 500 (1930) 6

Wirtz v. *Jones*, 340 F.2d 901 (5th Cir. 1965) 4, 12

Wirtz v. *Thompson Packers, Inc.*, 224 F.Supp. 960 (E.D. La. 1963) 5, 11, 12

Wirtz v. *Turner*, 330 F.2d 11 (7th Cir. 1964) 5

Constitutional Provisions, Statutes and Rules:

Seventh Amendment, United States Constitution 1, 2, 3, 7, 9

Fair Labor Standards Act of 1939, as amended, (29 U.S.C. § 201 *et seq.*) 2, 3, 4, 5, 6, 7, 11, 12, 13

Federal Rules of Civil Procedure:
Rule 38(a) 3

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HON. CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Evansville Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 3, 1970.

OPINIONS BELOW

On motion of the Secretary of Labor, the United States District Court for the Southern District of Indiana, Evansville Division, struck Petitioner's request for jury trial, but rendered no opinion.

The Court of Appeals for the Seventh Circuit affirmed, citing two cases from the Fifth Circuit Court of Appeals (Appendix A).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 3, 1970, and a copy thereof is attached (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The Secretary of Labor brought this action under section 17 of the Fair Labor Standards Act of 1939, seeking to enjoin Petitioner from committing alleged violations of the Act, and to compel Petitioner to pay certain employees money for overtime allegedly accrued but not paid. The District Court denied Petitioner's demand for a jury trial and the Court of Appeals affirmed.

The questions presented are:

1. Whether the Petitioner is constitutionally entitled to a jury trial of that portion of the complaint which seeks money with respect to Petitioner's alleged past violations of the Act;

2. Whether the decision below denying a jury trial conflicts with the constitutional principles set forth by this Court in *Beacon Theatres, Inc.* v. *Westover*; *Dairy Queen* v. *Wood* and other decisions; and

3. Whether the Secretary of Labor may avoid a jury trial by proceeding under section 17 of the Act, when under related sections, and when seeking identical relief, the parties would be entitled as a matter of constitutional right to a jury trial.

STATUTES AND FEDERAL RULES INVOLVED

The Seventh Amendment to the Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Section 17 of the Fair Labor Standards Act of 1939 (29 U.S.C. §217) provides as follows:

> The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of Section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title.

Other pertinent portions of the Fair Labor Standards Act, and Rule 38(a) of the Federal Rules of Civil Procedure are set forth in Appendix B.

STATEMENT

The Secretary of Labor brought this action under section 17 of the Fair Labor Standards Act, seeking to enjoin Petitioner from committing alleged violations of the Act, and also to compel Petitioner to pay certain employees money for overtime allegedly accrued but not paid. Section 17 grants the district courts jurisdiction to enjoin violations of the Act, including those sections Petitioner is alleged by the Secretary to have violated. In his complaint the Secretary alleged that Petitioner had violated sections 15(a)(2) and 7 of the Act by failing to compensate at one and one-

half times normal pay all employees who worked more than 40 hours per week; and that Petitioner had violated sections 15(a)(5) and 11(c) of the Act by failing to make, keep and preserve adequate and accurate records of its employees and the wages, hours and other conditions and practices of employment.

Because the Secretary was seeking to impose a judgment compelling the payment of money, Petitioner requested a jury trial. The Secretary moved to strike the jury demand, arguing that actions pursuant to section 17 are equitable in nature and do not entitle the parties to a jury trial. The District Court granted the Secretary's motion to strike.

Petitioner then sought a writ of mandamus in the Court of Appeals for the Seventh Circuit, pursuant to the "All Writs" Act (28 U.S.C. §1651). The Court of Appeals denied the petition, citing *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965) and *Sullivan* v. *Wirtz*, 359 F.2d 426 (5th Cir. 1966) *cert. den.* 385 U.S. 952.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously denies Petitioner its constitutional right to a jury trial in an action to recover money, because it conflicts with constitutional principles announced by this Court, and because the question is a recurrent one of constitutional interest.

The Secretary instituted this action under the Fair Labor Standards Act, seeking to collect money. Under section 17 of the Act the District Court may award him money by "enjoining" Petitioner from continuing to withhold the alleged back pay. To award such money, the court must find that Petitioner owes back pay to its employees.

A district court can award back pay under any one of three enforcement provisions of the Act: sections 16(b), 16(c) or 17.

Section 16(b) permits an employee to sue for pay withheld in violation of the Act.[1] In such actions there is a right to trial by jury. 5 MOORE, FEDERAL PRACTICE, §38.27 p. 238 (1969); *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950); *Wirtz* v. *Thompson Packers, Inc.*, 224 F. Supp. 960 (E.D. La. 1963); *Olearchick* v. *American Steel Foundries*, 73 F.Supp. 273 (W.D. Pa. 1947).

Section 16(c) permits the Secretary of Labor to sue for pay withheld in violation of the Act.[2] In such actions also, there is a right to trial by jury. *Wirtz* v. *Turner*, 330 F.2d 11 (7th Cir. 1964).

---

[1] Section 16(b) of the Act provides, in pertinent part: (b) Any employer who violates the provisions of [the minimum wage and maximum hour requirements] of this title shall be liable to the employee or employees affected in the amount of their unpaid wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. ••• The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, . . .owing to such employee . . . by an employer liable therefor under the provisions of this subsection. (29 U.S.C. §216(b) (1969))

[2] Section 16(c) of the Act provides, in pertinent part: (c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees . . . and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section . . . (29 U.S.C. §216(c) (1969))

Section 17 permits the Secretary of Labor to sue for injunctive relief, both to restrain future violations of the Act, and to compel the payment of wages withheld in violation of the Act.

It is clear that one part of section 17 simply provides equitable machinery for accomplishing exactly what the Secretary may do at law under section 16(c), and what the employee may do at law under section 16(b); that is, sue for money. In fact, the rights of employees under section 16(b) are extinguished when the Secretary sues under section 17. In each case the result of a successful action will be the same: an employer will be required to pay a money judgment. Thus, an action under section 17 may point in two directions: one part will seek injunctive restraint of violations of the Act, and a second part will seek to restrain the employer from not paying wages allegedly withheld in violation of the Act. The first part is clearly equitable: suits for injunctions restraining future conduct are traditional equitable relief. Indeed, at common law injunctions were almost exclusively prospective. As the Court noted in *LaCassagne* v. *Chapuis*:

> "The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already." 144 U.S. 119 at 124 (1892).

Even when statutes intervene, as in antitrust litigation, actions for injunctions have been held to deal with future, not past violations. *United States* v. *Oregon Medical Society*, 343 U.S. 326 (1952); *Standard Oil Co.* v. *United States*, 283 U.S. 163 (1931); *White* v. *Sparkill Realty Co.*, 280 U.S. 500 (1930); *Swift & Co.* v. *United States*, 276 U.S. 311 (1928); *Duplex Co.* v. *Deering*, 254 U.S. 443 (1921). Thus as the Court noted in *United States* v. *Oregon Medical Society*:

> "The sole function of an action for injunction is to forestall future violations [of the anti-trust statutes]." 343 U.S. at 333.

Petitioner does not argue that it is entitled to a jury trial of that part of Respondent's action which seeks to enjoin future violations of the Act.

Petitioner does argue that to the extent the Secretary seeks to compel payment of money for overtime allegedly due certain employees, the action is basically "legal" in nature, and is no different in purpose and effect from an action at law under section 16(c) of the Act. The issue tried in such an action is the liability under the Act of an employer to an employee for back wages. It is equivalent to an action for money damages. Under the Seventh Amendment as interpreted by the Supreme Court, petitioner has in those circumstances a right to submit the facts involved in its alleged violation to the consideration of a jury. The Secretary should not be able to avoid this constitutional right by seeking the identical damages in one form of action rather than in another.

This Court's careful expansion of the right to trial by jury indicates the fundamental importance of a jury trial to this nation's system of justice. As noted in *Dimick* v. *Schiedt*, 293 U.S. 474 (1934):

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the rights of a jury trial should be scrutinized with the utmost care." 293 U.S. at 486.

Recent decisions have reflected, in a variety of settings, the Court's concern for this basic right. *Duncan* v. *Louisiana*, 391 U.S. 145 (1967); *Bloom* v. *Illinois*, 391 U.S. 194 (1967). Further, the Court has noted that with the enlarging scope

of legal remedies, the necessity for equitable remedies has decreased. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. at 510.

Thus the right to trial by jury has been broadened to encompass many actions which once were "equitable."

In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), the respondent sought to avoid a jury trial of an anticipated anti-trust suit by bringing a declaratory judgment action. Petitioner sought a jury trial on the ground that a prior determination of common issues at equity would foreclose petitioner's right to a jury trial of those issues. The Court held that where equitable and legal issues are blended, the legal issues must be tried to a jury first, so that such a jury trial of those issues will not be precluded by prior determinations of fact at equity.

Dairy Queen v. *Wood*, 369 U.S. 469 (1962), explored further the parameters of the Seventh Amendment right. There plaintiff sought an injunction to restrain the use of a franchise in breach of the franchise agreement, plus an accounting for past use. The defendant argued that, insofar as plaintiff by means of an accounting sought to collect money, the issues were properly characterized as legal, and must be tried to a jury. This Court agreed, reversing lower court holdings which denied defendant a jury trial. The Court correctly pointed out that determinations of fact necessary to the awarding of money lie within the province of a jury, regardless of the way the action is characterized by the pleadings:

> "The respondents' contention that this money claim is 'purely equitable' is based primarily upon the fact that their complaint is cast in terms of an 'accounting,' rather than in terms of an action for 'debt' or 'damages.'

> But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." 369 U.S. at 477-478.

The Court held that the constitutional right depends only on whether the action involves factual issues regarding the recovery of money, which a jury at law would be competent to decide. If such issues are present, the Seventh Amendment right attaches:

> . . . A jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled on is that of breach of contract, that of trademark infringement, or any combination of the two." 369 U.S. at 478-479.

Subsequent decisions have maintained this constitutional requirement that legal issues, no matter how characterized, must be tried to a jury. In *Simler* v. *Conner*, 372 U.S. 221 (1963), this Court held that a diversity action for a declaratory judgment as to the amount of attorney's fees owed defendant by the plaintiff was legal in nature:

> The fact that the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action. *The questions involved are traditional common-law issues which can be and should have been submitted to a jury under appropriate instructions as petitioner requested.*" 372 U.S. at 223 [Emphasis supplied].

Similarly, in *Meeker* v. *Ambassador Oil Corp.*, 375 U.S. 160 (1963), this Court reversed a lower court decision denying a jury in a suit characterized as an equitable action to quiet title.

Very recently, the Court has reiterated the Seventh Amendment requirement that legal issues, even when arising in equitable proceedings, be tried to a jury. In *Ross* v.

Bernhard, 396 U.S. 531 (1970), a corporate shareholder brought a derivative action seeking an accounting from certain corporate officers and outsiders for conversion of corporate assets. This Court reversed the Second Circuit, holding that despite the equitable nature of a derivative action, to the extent the corporation would have had a legal cause of action against the defendants, the shareholder had one also:

> "In the instant case we have no doubt that the corporation's claim is, at least in part, a legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence." 396 U.S. at 542, 24 L.Ed. 2d 729, 738 (1970).

Under the principles set forth in these cases, if a legal issue cognizable at law and triable by jury is involved in a pending action, a party's timely demand for a jury trial must be granted. It is immaterial that such action can be categorized as "basically equitable," or that the equitable issue "outweighs" the legal issue. *Thermo-Stitch Inc.* v. *Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961). When a federal litigant brings an "equitable" action, which is concerned in reality with obtaining a money judgment, the defendant in such action is still constitutionally entitled to a jury trial. In *DePinto* v. *Provident Security Life Insurance Co.*, 323 F.2d 826 (9th Cir. 1963), Plaintiff shareholders brought a derivative suit against the directors of the corporation for their alleged negligent management of corporate funds. The defendants' demand for a jury trial was denied. The court of appeals reversed:

> "Thus, except under most imperative circumstances, a right to a jury trial on legal issues may not now be denied to a federal litigant on the ground that the case reached court only through equity, or because equitable

> rights are involved, or because the legal issues are 'incidental' to the equitable issues, or because substantive equitable remedies are sought, or by the device of trying equitable issues first." 323 F.2d at 835-836.

See also, Halladay v. *Verschoor*, 381 F.2d 100 (8th Cir. 1967).

The Court should grant this Petition because recent decisions in federal courts have indicated that these issues are likely to be recurrent ones. A federal district court has held that an employer faced with an action by the Secretary of Labor under section 17 of the Act is entitled to a jury trial of the Secretary's claim for back wages. *Wirtz* v. *Thompson Packers, Inc.*, 224 F.Supp. 960 (E.D. La. 1963). The court's reasoning in that opinion is compelling and merits extended quotation:

> "The primary concern in the instant case then is whether an action brought by the Secretary of Labor to enjoin violations of the Fair Labor Standards Act which also seeks back wages in behalf of defendant's employees involves a legal issue entitling defendant to a jury trial. As noted above, the employees have a discernible interest in the proceeding, and in fact, their rights are extinguished when this action is commenced. Had these employees sued their employer before seeking the aid of the Labor Department, it is likewise clear that the employer would retain the right to trial by jury in such a case since the action for back wages raises legal issues only. A purely equitable action for injunctive relief clearly does not permit jury consideration, but, under the recent Supreme Court rulings, any blending of legal and equitable issues entitles the parties to a jury trial of the legal issues. This Court concludes that in an action brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to obtain payment of back overtime wages found to be due and owing by the court, jury trial is a matter of Constitutional right." 224 F.Supp. at 964.

On the other hand, the Fifth Circuit Court of Appeals has overruled the lower court in *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965); *Sullivan* v. *Wirtz*, 359 F.2d 426 (5th Cir. 1966). However, the Fifth Circuit's reasoning in these cases is less persuasive than that of the district court in *Thompson Packers*. Moreover, the Fifth Circuit rendered only one reasoned opinion, *Wirtz* v. *Jones*. *Sullivan* merely relied upon *Jones* for its authority, as has the Seventh Circuit in the instant case.

In *Jones*, the court held the employer was not entitled to a jury trial under section 17 because:

> . . . the purpose of the injunction to restrain the withholding of wages due is not to collect the debt owed by an employer to his employee but to correct a continuing offense against the public interest. 340 F.2d at 904.

It is true that an action under section 17 is not in form one to collect a debt, but, as Petitioner has shown, this Court has repeatedly held that the *form* of the action is not controlling. The Secretary's action remains in essence one to compel payment of back wages, despite its characterization as an "equitable" action.

The court in *Jones* also hints that an employer is not entitled to a jury trial because the award of money in such cases is in the nature of a penalty for an offense against the public interest. The court's reasoning that public interest precludes the Petitioner's constitutional right to jury trial is somewhat hard to follow. Society also has an interest in convicting criminals, yet this public interest has not been asserted as a reason for denying a jury trial in criminal cases. The Fifth Circuit has failed to explain how the public welfare suffers when a case is tried to a jury. Indeed, cases identical to the instant case can be tried to juries under sections 16(b) and 16(c) of the Act. In an action

under section 17 for identical relief, the parties should be entitled to a jury trial.

Finally, the legal nature of the Secretary's claim for back pay is not affected by the fact that the action is statutory rather than common law in origin. Actions under sections 16(b) and 16(c) are also statutory in origin, but a jury trial is nevertheless granted in those cases. Further, courts have frequently granted jury trials in actions which are statutory in origin and which seek money judgments. *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916); *Leimer* v. *Wood*, 196 F.2d 828 (8th Cir. 1952); *Steffen* v. *Farmers Elevator Service Co.*, 109 F.Supp. 16 (N.D. Iowa 1952).

CONCLUSION

The decision below denies Petitioner a jury trial in an action to recover money. It conflicts with constitutional principles enunciated by this Court, and it represents a constitutional problem which will recur in other circuits. For these reasons, Petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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November, 1970

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Thursday, September 3, 1970

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

GEYER BROADCASTING CO., INC.,
a corporation,
Petitioner,

vs.

No. 18707
HON. CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Evansville Division,
Respondent.

Petition for Writ of Mandamus.

ORDER

Petitioner seeks a writ of mandamus to compel respondent to grant petitioner a jury trial. The action against petitioner was brought by the Secretary of Labor under section 17 of the Fair Labor Standards Act (29 U.S.C. §217). That section grants jurisdiction "to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter. . . ." The complaint seeks restraint of petitioner from further violation and restraint from withholding of

overtime compensation. Petitioner demanded a jury trial, and respondent has stricken the jury demand, on motion of the secretary.

If petitioner were entitled to a jury, issuance of a writ of mandamus would be appropriate. *Beacon Theatres* v. *Westover* (1959), 359 U.S. 500, 511; *Dairy Queen* v. *Wood* (1962), 369 U.S. 469, 472.

Petitioner is not, however, entitled to a jury trial in the action brought by the secretary. *Wirtz* v. *Jones* (5th Cir., 1965), 340 F2d 901, reaffirmed in *Sullivan* v. *Wirtz* (5th Cir., 1966), 359 F2d 426, cert. denied 385 U.S. 852.

Accordingly,

IT IS ORDERED that the petition for writ of mandamus is denied.

A True Copy:
Teste:

Kenneth J. Cornick
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

By H. K. McCormack
Deputy Clerk.

APPENDIX B

The Fair Labor Standards Act of 1939, 29 U.S.C. §201 *et seq.*, provides as follows, in pertinent part:

§ 206. Minimum wage

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section . . . .

§ 207. Maximum hours

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed . . . .

§ 211. Investigations, inspections, records, and homework regulations

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such trans-

criptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Secretary of Labor shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) • • •

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

(3) * * *

(4) * * *

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall

be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or section 207 of this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided*, That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts,

and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretory of Labor if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action * * *

Rule 38(a) of the Federal Rules of Civil Procedure provides as follows:

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1024

GEYER BROADCASTING CO., PETITIONER

v.

HON. CALE T. HOLDER, UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. The Secretary of Labor brought this suit under Section 17[1] of the Fair Labor Standards Act (29 U.S.C. 217) to restrain petitioner from continuing to violate the overtime and recordkeeping provisions of the Act (29 U.S.C. 207, 211(c), set forth at Pet. 16–17) and from continuing to withhold the payment of overtime compensation due certain of its employees. Petitioner filed a demand for a jury trial along with its answer. The Secretary moved to strike

[1] Section 17 of the Fair Labor Standards Act provides, in pertinent part: "The district courts * * * shall have jurisdiction for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act * * *."

412-848—70

the demand and his motion was granted. Petitioner then sought a writ of mandamus from the court of appeals to compel the granting of a jury trial, but such relief was denied (Pet. App. 14–15).

2. The decision below presents no conflict with any other court of appeals decision. Indeed, the only other circuit to consider the question has reached the same result. See *Wirtz* v. *Jones*, 340 F.2d 901 (C.A. 5), and *Sullivan* v. *Wirtz*, 359 F.2d 426 (C.A. 5), certiorari denied, 385 U.S. 852.[1]

The line of cases on which petitioner relies, including this Court's recent decision in *Ross* v. *Bernhard*, 396 U.S. 531, all involved actions brought by private individuals to enforce legal claims. By contrast, the purpose of a suit by the Secretary of Labor for a statutory injunction "is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest," and the award of back pay "is simply a part of a reasonable and effective means which Congress, after trial and error, found it necessary to adopt to bring about general compliance * * *." *Wirtz* v. *Jones*, *supra*, 340 F.2d at 904.

[1] Numerous district courts in other circuits have uniformly rejected demands for jury trial in suits under Section 17 of the Fair Labor Standards Act. See, *e.g.*, *Wirtz* v. *Active City Wide Service Co.*, 230 F.Supp. 666 (N.D. Ill.); *Wirtz* v. *Robert E. Bob Adair, Inc.*, 224 F.Supp. 750 (W.D. Ark.); *Wirtz* v. *Tinker's Bigg and Littel Stores*, 16 WH Cases 657, 50 Lab. Cases ¶ 31,622 (N.D. Cal., not officially reported); *Wirtz* v. *Moorehead*, 16 WH Cases 417, 49 Lab. Cases ¶ 31,555 (W.D. S.C., not officially reported); *Wirtz* v. *Florence and Co.*, 18 WH Cases 631, 58 Lab. Cases ¶ 32,097 (D. Kan., not officially reported); *Wirtz* v. *Sesame Oil Co.*, 293 F.Supp. 211 (E.D. Pa.).

Moreover, it has repeatedly been held that the right to a jury trial does not extend to statutory injunction suits brought by the officials responsible for the enforcement of regulatory legislation. See, *e.g.*, *Co-Efficient Foundation* v. *Woods*, 171 F. 2d 691 (C.A. 5), *McCoy* v. *Woods*, 177 F. 2d 354 (C.A. 4), *Timmons* v. *United States*, 194 F. 2d 357 (C.A. 4), certiorari denied, 344 U.S. 844, *Howard* v. *United States*, 214 F. 2d 759 (C.A. 10)—all actions under the Emergency Price Control Act of 1942 for injunction and restitution of rent overcharges[1]—and *Harkness* v. *Sweeny Independent School District*, 427 F. 2d 319 (C.A. 5), petition for certiorari pending, No. 561, this Term, and *Johnson* v. *Georgia Highway Express Inc.*, 417 F. 2d 1122 (C.A. 5)—both actions under the Civil Rights Act of 1964 for injunction and back wages.

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[1] *Leimer* v. *Woods*, 196 F. 2d 828 (C.A. 8), relied on by petitioner (Pet. 13), is not to the contrary. Although brought under the Emergency Price Control Act, it sought both restitution and treble damages. Because of the legal claim for damages, the court ordered a jury trial for this aspect of the case. The court specifically acknowledged, however, that "[t]he *granting of general* injunctive or restitutive relief * * * plainly is an exercise of jurisdiction by a court of equity and as such does not involve any right to a jury trial" (196 F. 2d at 832). The court's treatment of the jury trial issue was cited with approval by this *Court in Beacon Theatres* v. *Westover*, 359 U.S. 500, 511.

For the foregoing reasons, it is respectfully submitted that the petition for a writ certiorari should be denied.

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